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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALOHA AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION,
STATE OF HAWAII, Appellee.

HAWAIIAN AIRLINES, INC., Appellant,

v.

DIRECTOR OF TAXATION OF THE
STATE OF HAWAII, Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF HAWAII

REPLY BRIEF OF APPELLANT ALOHA AIRLINES, INC.

RICHARD L. GRIFFITH*
RICHARD R. CLIFTON
CADES SCHUTTE FLEMING
& WRIGHT
1000 Bishop Street
Honolulu, Hawaii 96813
(808) 521-9200
(*Counsel of Record)

Attorneys for Appellant
ALOHA AIRLINES, INC.

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REPLY BRIEF OF APPELLANT ALOHA AIRLINES, INC.

This Reply Brief is submitted on behalf of Aloha Airlines, Inc.[1] ("Aloha Airlines") in response to the Brief of the Director of Taxation of the State of Hawaii (the "Director") and the briefs submitted as amici by the States of Alaska, Arizona, Oklahoma, Washington and West Virginia; by the Multistate Tax Commission joined by certain other states; and by the State of New York.

[1]Except for a wholly-owned subsidiary, Aloha Airlines has no affiliates, parent companies or subsidiaries.

SUMMARY OF ARGUMENTS OF DIRECTOR AND AMICI AND OF THE REPLIES OF ALOHA AIRLINES

In their briefs, the Director and his amici raise four principal issues. A summary of the Director's argument as to each issue, with Aloha Airlines' reply to each, follows:

1. Is the Hawaii tax expressly permitted by subsection (b) of 49 U.S.C. § 1513?

The Director argues that the Hawaii Public Service Company Tax ("PSC Tax"), Haw. Rev. Stat. §239-6, is expressly exempted by subsection (b) of 49 U.S.C. § 1513 from the prohibitions of subsection (a) because it is reasonably characterized as a property tax.

In fact, the PSC Tax is not expressly exempted by subsection (b) of 49 U.S.C. § 1513. The forms of taxation listed in subsection (b) are permitted only if they are not prohibited by subsection (a). Subsection (b) does not serve to "exempt" any otherwise forbidden tax. Moreover, the PSC Tax would not qualify for exemption in any event since it is not, for the purposes of this federal statute, a "property" tax.

2. Is the Hawaii PSC Tax permissible under 49 U.S.C. §1513 because gross receipts from air carriage are the "measure" but not the "subject" of the tax?

The Director contends that even though the PSC Tax is measured by gross receipts, the tax is not "on" gross receipts from air transportation. The subject or incidence of the tax is instead on personal property, there being a "vast difference" between the "subject" of a tax and the "measure" of a tax.

Whatever viability still exists in the distinction between the "subject" of a tax and the "measure" of a tax in other contexts, it is irrelevant here because a federal statute having specific pre-emptive effect is involved. In enacting subsection (a) of 49

U.S.C. §1513, Congress was concerned not only with the legal incidence or "subject" of a forbidden state tax, but also with the economic burden or "measure" of such a tax. Congress clearly banned any state tax which would directly or indirectly add any state tax burden to the already steep federal excise tax on air fares.

3. Is the pre-emptive sweep of 49 U.S.C. § 1513 limited to user taxes and to certain narrowly defined substitutes for user taxes?

The Director alleges that 49 U.S.C. § 1513 is ambiguous because of seeming contradictions between subsections (a) and (b), and that the legislative history and certain rules of statutory construction indicate a circumscribed and narrow scope to the pre-emptive effect of the statute. Specifically:

a. Its pre-emptive impact is limited in principal part to user taxes, including head taxes, similar in incidence or effect to the user taxes imposed by the Airport and Airway Revenue Act of 1970.

b. To the extent that any pre-emptive effect of § 1513 extends beyond state user taxes, including "head taxes," it extends only to discriminatory taxes which are, in effect, substitutes for such user taxes and which are imposed discriminatorily against airlines and not against a wide range of other business.

This analysis totally misses the mark. User taxes and discriminatory substitutes therefor are merely two specific areas of mischief within a larger circle of congressional concern. In 49 U.S.C. §1513, Congress broadly identified and pre-empted any tax on persons traveling in air commerce or on the gross receipts derived therefrom. The reason for this legislative action is manifest: having imposed steep federal excise taxes on air transportation, eight per cent on domestic air fares and five per cent on air freight, Congress determined that this was as much taxation as air commerce should bear. Hence, any state tax on gross receipts from air carriage on top of the federal tax was

forbidden, whether or not the state tax was termed a "user" tax and even if the state tax did not discriminate against the airlines as compared to other lines of commerce in the state. It was the combined impact on air fares of a state tax on top of the federal excise tax that motivated Congress. Both the logic and the plain words of the federal statute require the conclusion that the Hawaii PSC Tax is pre-empted, and the overwhelming weight of legislative history supports this result as well.

4. Is the PSC Tax a general business tax of wide applicability which does not run counter to 49 U.S.C. § 1513?

The Director asserts that the PSC Tax, in purpose and effect, is a general business tax of wide applicability. As such, it runs counter to no federal policies, nor to 49 U.S.C. §1513, because it is consistent with long-standing congressional policy not to interfere with the general business taxes of states except in unusual, narrow, and specifically defined situations.

Again, the Director's argument misses the mark, because the Hawaii PSC Tax, whether or not it is discriminatory, imposes the specific burden on air transportation prohibited by 49 U.S.C. §1513. If the Hawaii PSC Tax of three or four per cent is imposed on top of the eight per cent federal tax on passenger air fares, the combined burden on air transportation of passengers (or gross receipts therefrom) amounts to 11 or 12 per cent. Imposition of that additional burden would undermine the mandate of Congress in the federal Airport Development Aid Program ("ADAP") and the federal policy to encourage aviation. The purpose of ADAP was to create a single federal fiscal package consisting of federal taxes on users of aviation facilities and federal expenditures to develop and improve such facilities. Thus, ADAP reflects a legitimate federal response to a national problem. The generalized argument of the Director on this point, reflecting a narrowly based parochial view, must in the national interest be swept aside by the specific purpose and mandate of 49 U.S.C. § 1513.

In addition, since Aloha Airlines filed its brief on the merits, the New York Court of Appeals has affirmed an Appel-

late Division decision striking down a New York tax similar to the Hawaii PSC Tax, and the Superior Court of the State of Alaska has ruled similarly in a case concerning an Alaska tax. The judiciaries of other states have implemented the plain language and intent of 49 U.S.C. § 1513, and have been unpersuaded by the arguments offered by the Director and amici in the present case. Only the Hawaii court has decided otherwise.

An affirmation of the Hawaii Supreme Court decision in this case would repudiate these well-reasoned decisions and would disrupt the balanced and finely tuned federal fiscal program to improve the nation's airport and airway system.

ARGUMENT IN REPLY

1. THE HAWAII PSC TAX IS NOT EXPRESSLY EXEMPT UNDER SUBSECTION (b) OF 49 U.S.C. § 1513 AND IS NOT REASONABLY CHARACTERIZED AS A PROPERTY TAX.

Statutory construction begins with the words of the statute. Subsection (a) of 49 U.S.C. §1513 expressly bars all state taxes on gross receipts from air transportation, whether the levy is direct or indirect. It does so without regard to what the tax is called or how it is labelled. In arguing that subsection (b) exempts from subsection (a) any state tax which is given the label of a tax listed in subsection (b), the Director ignores the plain words of the statute, which are explicit and clear in defining the relationship between the two subsections. Only those taxes not prohibited by the terms of subsection (a) can survive:

> (b) [N]othing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a)* of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . . . (emphasis added)

The phrase "other than those enumerated in subsection (a)" demonstrates that subsection (b) does not curtail the prohibitions of subsection (a). Subsection (b) merely explains that other types of taxes are not barred.[2] The Hawaii PSC Tax fails to clear the first hurdle in subsection (b), and thus its label is irrelevant.

Nor is the Hawaii PSC Tax reasonably characterized as a "property" tax. The tax is not related in any way to the personal property of the airlines in Hawaii. The tax is based on gross receipts, it rises and falls with gross receipts, and if the airline has no gross receipts, no tax is levied, regardless of the value or extent of the taxpayer's personal property. Obviously, the taxable incident which the Hawaii PSC Tax reaches is the taxpayer's gross receipts from air transportation. In fact, the PSC Tax return does not even make reference to the personal property of the airlines. (J.A. 36)

Although Haw. Rev. Stat. §239-6 describes the tax as a "means of taxing the personal property" of airlines, that characterization cannot be accepted for the purposes of the federal statute. No other Hawaii statute, whether in effect now or at the date of enactment of the PSC Tax or during the years here in issue (1974-1977), purports to tax the personal property of any other Hawaii taxpayer. Hawaii has not assessed a personal property tax since 1947. In the face of the obvious economic impact of the tax, to characterize it as a "property" tax permitted by 49 U.S.C. §1513(b) is to indulge in a legal fiction devoid of substance. For purposes of federal law, the state's description is not binding. *First Agricultural National Bank v. State Tax Commission*, 392 U.S. 339, 347 (1968). Accepting

[2] It is noteworthy that subsection (b) lists "net income taxes" as permissible, which only emphasizes that *gross* receipts taxes, whether direct or indirect, are not.

this "personal property tax" fiction would vitiate the federal statute.[3]

2. THE DISTINCTION BETWEEN A "SUBJECT" OF TAX AND A "MEASURE" OF TAX IS IRRELEVANT SINCE THE PROHIBITORY COMMAND OF 49 U.S.C. §1513 REACHES BOTH

It is true, as the Director states, that this Court held in *Railway Express Agency v. Virginia*, 358 U.S. 434, 441 (1959) ("*REA II*"), that it was constitutionally permissible under the commerce clause for states to use gross receipts as the tax base for property taxation. But *REA II* is not relevant to this case because it involved no federal statute claimed to have preemptive force, as does 49 U.S.C. §1513. The predominance of a specific federal statute under the supremacy clause was not involved in *REA II*,[4] so it provides no rule of construction for

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[3]The Director observes (at 2, 9, 10, 26 and 46) that the continued voluntary payments by the airlines of the PSC Tax for a time after the enactment of 49 U.S.C. §1513 and their "belated" filing of the present claims must indicate doubt on their part as to applicability of that statute to the PSC Tax. This argument is advanced by the Director for the first time on brief in this Court. If it had been advanced at trial, Aloha Airlines would have had the opportunity to present evidence that such voluntary payments were made while Aloha Airlines was holding discussions with the Director as to possible alternatives to litigation, that a cessation of such payments would have triggered an assessment of the PSC Tax, and that such assessment would have forced Aloha Airlines to file in court within 30 days under Haw. Rev. Stat. §§239-7 & 235-114, thus prematurely ending the search for an out-of-court solution. In the end, no such solution was achieved, and Aloha Airlines commenced this case by filing a timely appeal in the Hawaii Tax Appeal Court, covering tax years starting with 1974, the first year after the enactment of 49 U.S.C. §1513. There is nothing "belated" about Aloha Airlines' claim.

[4]*REA II* merely held that a state "franchise" tax, measured by in-state gross receipts and in lieu of all other property taxes on rolling stock and intangibles, was not invalid under the commerce clause. *REA II* was careful to disclaim that a state "legislature may effect a validation of a tax, otherwise unconstitutional, by merely changing its descriptive words." 358 U.S. at 441.

determining what Congress meant in 49 U.S.C. §1513.[5] That a gross receipts measure may be permissible in the absence of relevant legislation does not assure its continued validity when a statute with a clear pre-emptive purpose is enacted.

This Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), rejected a claim that a Mississippi tax on the privilege of doing business in that state, which was measured by "gross proceeds of sales or gross income or values," was unconstitutional as a tax on interstate commerce. In doing so, the Court overruled a previous decision which focused on the label given to the state tax. Reviewing other decisions, the Court noted that "[t]hese decisions have considered not the formal language of the tax statute but rather its practical effect." *Id.* at 279. The Court rejected the use of labels as being determinative, observing that: "The reason for attaching constitutional significance to a semantic difference is difficult to discern." *Id.* at 285. In the present case, where the issue is whether the PSC Tax is prohibited by a particular federal statute, it is similarly unacceptable to let the decision turn on semantic distinctions. Yet that is the essence of the Director's argument.

The proper question here is the intent of Congress in enacting §1513. That intent is discussed more fully below, but for now it is enough to note that nothing supports the Director's view that Congress intended to distinguish between "subject" and "measure" in this fashion or to make the prohibition contained in the statute so easy to evade. There is even less reason to attach significance to this distinction in light of the use of the words "directly or indirectly" within the prohibition of subsection (a). Congress was not concerned with semantic niceties; it meant to prevent a certain kind of taxation in any guise. The Director and his amici have failed to cite a single

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[5] As discussed in Aloha Airlines' brief on the merits, at 16-18, the existence of an express federal prohibition requires a different kind of "pre-emption" analysis. *See, e.g., Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).

current authority supporting the "subject vs. measure" distinction to avoid the application of a federal statute with preemptive purpose. That is for good reason: such a distinction makes no sense.

3. THE HAWAII PSC TAX IS NOT PROTECTED AS SOMETHING OTHER THAN A "USER" TAX OR AS A "NON-DISCRIMINATORY" TAX, SINCE IT IS PRECISELY THE KIND OF TAX THE FEDERAL STATUTE PROHIBITS

Perhaps in recognition that the plain words of 49 U.S.C. §1513 are inconsistent with their position, the Director and his amici focus most of their discussion on an effort to rewrite the statute by an analysis of purported congressional intent gleaned from legislative history. By using highly selective quotations from the legislative history, they have created an interpretation of the federal statute which is at odds with its plain terms and inconsistent with its purpose. The Director contends that the statute is intended "*only* to prevent the states from: (1) directly or indirectly imposing taxes similar to the federal taxes already imposed by Congress *on users of air transportation* . . .; and (2) imposing *discriminatory* taxes on airlines that, in effect, would impose the forbidden federal user taxes by an indirect means." (emphasis added) (Director's brief, at 7.) The Director's effort is futile, however, for the statute which he purports to interpret is not the statute which Congress has written.

(a) The prohibitions of 49 U.S.C. §1513 are not limited to taxes imposed upon users.

The federal program to aid the development of the nation's airports is primarily financed by a tax of eight per cent of the gross receipts from the sale of domestic passenger tickets, a tax of five per cent of receipts from air freight, and a flat $3.00 tax on each international passenger ticket. The Director contends that the federal prohibition in §1513 is limited to taxes similar to these user taxes.

The notion that Congress intended to prohibit only "head" taxes and taxes imposed directly upon the passengers and freight users of the aviation system, and not taxes imposed upon airlines, cannot be reconciled with the language in §1513(a) prohibiting taxation of "the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom." Obviously, these words refer to the carriage by, the sales by, or the gross receipts of the airlines. If Congress had meant to prohibit only "user" taxes, it would not have included such language, which could only refer to taxes imposed on airlines.

Congress acted logically in including the airlines, for to be effective such a prohibition must apply to both parties to the transaction. In economic terms, a three or four per cent tax on the price of an airplane ticket, paid by the passenger, and a three or four per cent tax on the price of an airline ticket, paid by the airline from the revenue received from the passenger, are exactly the same, and they will have exactly the same effect—raising the total cost of the airplane ticket by three or four per cent.[6] It is that effect which Congress sought to prevent.

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[6]This Court made a similar observation in a somewhat different context in *Washington v. United States*, ___ U.S. ___, 75 L.Ed.2d 264, 103 S.Ct. 1344 (1983), when it spoke of a sales tax that could be placed upon either the contractor putting up a building (the seller) or the landowner for whom the building is constructed (the buyer):

> If the tax is the same, and the parties have the same bargaining power, the amounts the purchasers pay and the amounts the contractors receive will be identical in the two cases. Thus, it makes no difference to the contractor (or to the purchasers) which of them is required to pay the tax to the State, as long as they have the opportunity to allocate the burden among themselves by adjusting the price.

75 L.Ed.2d at 270 n.4. In that case the Court ultimately upheld the application of a state sales tax against a claim under the supremacy clause that it discriminated against contractors for the federal government. In the present case, the concern of Congress was with the effective burden of a tax on air fares, not with whether it would nominally come from the pocket of the passenger or the airline. In economic terms, it does not matter from which pocket the money is taken.

The Director has virtually conceded that the Hawaii PSC Tax must fall within the federal prohibition. In footnote 5 on page 13 of his brief, the Director defines "head tax":

> This brief uses the phrase "head tax" to mean a tax on each person that is a member of a designated class or group. In this case, it represents a tax levied on air passengers and may be either a flat rate tax or a percentage of fare tax. The tax may be either a direct tax collected from each passenger (as an enplaning or deplaning fee) *or an indirect tax imposed upon the airline but ultimately paid by the passenger*. (emphasis added)

That definition unmistakably covers and forbids the Hawaii tax at issue. What else can this be but a tax ultimately paid by the passenger? If all airlines are required to pay a three per cent tax on their ticket revenue, that tax will inevitably be passed on to the passengers as a direct cost of doing business. Since all airlines have to pay the tax, and since it varies exactly with ticket revenue, no other result makes sense.[7]

Indeed, Hawaii's own tax system contains an analogy proving the point. Chapter 237, Haw. Rev. Stat., imposes a privilege tax which, like the PSC Tax, is measured by gross income. Formally, the tax is imposed on the recipient of money, meaning the seller in a sales transaction. Nevertheless, that tax is recognized by the Internal Revenue Service as a sales tax which is deductible by the buyer in computing his federal income tax, and is similarly recognized by the Director as a sales tax deductible by the buyer for purposes of Hawaii's income tax. Obviously, the Director, like the Internal Revenue Service, recognizes that the real impact of the tax falls on the

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[7]This is a distinction between the taxes prohibited in §1513(a) and those listed in §1513(b) as being something else. Net income taxes and true property taxes, including the real property taxes which have been paid by Aloha Airlines, may be borne by its customers in some indirect sense, but they are not so immediately and exactly passed on to raise the ticket price by the amount of the tax.

buyer. So, too, would the real impact of the PSC Tax fall on the passenger and the freight user.[8]

That is precisely what Congress meant to prevent. Even accepting the Director's formulation, then, the PSC tax cannot survive, for it would do exactly what is prohibited—impose a state tax on air transportation users similar to the federal excise tax.

Congress was gravely concerned that a state tax on gross receipts from air carriage, when imposed on top of the federal eight per cent tax on air fares or five per cent tax on air freight, would unduly burden air commerce. In fact, the congressional concern is well founded. Consider the impact of the tax in Hawaii. The three or four per cent PSC tax when added to the eight per cent federal tax produces a total tax burden on passenger tickets of 11 or 12 per cent.[9] Congress acted well within reason when it decided that such a burden would be too heavy and thus would be contrary to the policy of encouraging aviation development.

A fair and balanced review of the legislative record only serves to reinforce the plain meaning of the statute and to discredit the strained interpretation of the Director.[10] Two particular observations are appropriate. First, the Director's efforts to limit the federal prohibition to "head charges" in some

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[8] In another sense, of course, the adverse effect of such a tax would also fall on the airlines. Since the tax would inevitably raise ticket prices and freight charges, use of the aviation system by the public would be discouraged and would decline, to the airlines' detriment. That result would be exactly contrary to the purpose of the federal aviation policy and program, including ADAP and §1513.

[9] The Hawaii PSC Tax is assessed at a rate of three or four percent, depending on whether the airline offers a discount rate schedule for school groups. See Aloha Airlines' brief on the merits, at 11.

[10] See the history outlined in Aloha Airlines' brief on the merits at 18-23; Hawaiian Airlines' brief on the merits at 16-24; and the brief of the Air Transport Association of America as amicus curiae in support of Appellants at 6-13.

narrower sense must fail, not only because the statutory language is far broader ("No State . . . shall levy or collect a tax, fee, head charge or other charge, directly or indirectly, . . ."), but also because the legislative history reflects a broader concern. The antecedents of 49 U.S.C. §1513 preceded, by over one year, this Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), which sparked concern about a proliferation of flat-amount head charges.

Second, the fact that Congress was concerned about such head charges and intended to prohibit them does not at all mean that such charges were its only concern and that it meant to prohibit only such charges. It is true, as the Director demonstrates, that Congress was concerned about head charges, but the Director has not and cannot demonstrate that the concern—and the prohibition—stopped there. It did not. Congress acted in a broader fashion. As stated in the conclusion of the 1973 report of the Senate Committee on Commerce:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted *to prohibit local taxation on passengers or on the carriage of passengers*. (emphasis added)

S. Rep. No. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1455, and in the Legislative History Appendix to the Director's brief, at 121. The logic of the federal statute required no less.

(b) The federal prohibition is not limited to "discriminatory" state taxes.

The interpretation of §1513(a) as merely prohibiting "discriminatory" state taxes is even more strained than the view that it extends only to taxes on users. That is not what the statute says. If that had been the intent of Congress, it would have said so. Even the Director concedes that the subject was "not addressed in the legislative history in any significant manner." (Director's brief at 12.) Besides, as was noted above in dis-

cussing head charges, to establish that there was congressional concern about discriminatory taxation does not establish that the concern stopped there.

In fact, the legislative record affirms that congressional concern did not stop there. An attempt was made in 1973 to amend the pending bill in the same way that the Director is here trying to rewrite the statute, and it was spurned. Congress turned a deaf ear to the State of Ohio in 1973 when that state sought to persuade Congress to add specific language to what would become 49 U.S.C. §1513 to permit "non-discriminatory" state taxation of gross receipts from air transportation.

The Ohio Deputy Tax Commissioner, Theodore Koetz, testified before a House subcommittee that the then-existing Ohio excise tax on gross receipts from air transportation was non-discriminatory. He indicated that in Ohio most businesses pay a franchise tax and a personal property tax, the latter being either a general personal property tax or the public utility ad valorem tax. Airlines, however, although subject to both the franchise tax and the personal property tax, only paid a small personal property tax, because unlike most other businesses, their major personal property, aircraft, was not subject to personal property tax. He went on to compare the total state taxes paid by airlines against the much larger amounts paid by railroads and the trucking industry.[11]

Then, in hopes of saving Ohio's four per cent excise tax on airlines' gross receipts, Mr. Koetz proposed to the Committee that the language italicized below be added to subsection (b) in an effort to permit state taxes on air carrier gross receipts if those

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[11] Airport Development Acceleration Act of 1973; Hearings on H.R. 4082, H.R. 2695, H.R. 4213, H.R. 4214, H.R. 4182, and S. 38 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce, 93d Cong. 1st Sess. 247 (1973) (Statement of Theodore Koetz), *reprinted in* the Director's Legislative History Appendix, at 145.

taxes were fairly apportioned to a particular state:

> (b) Nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, sales or use taxes on the sale of goods or services, *privilege or excise taxes, and gross receipts taxes fairly apportioned to a State* . . . . (emphasis added)

Id. at 249, *reprinted in* the Director's Legislative History Appendix, at 147-48.

Congress refused to adopt this language, which, of course, would have undercut the basic objective of prohibiting state taxes on the gross receipts which Congress itself was taxing. This specifically illustrates that Congress intended to bar any tax on or measured by gross receipts from air carriage, whether or not the tax was "discriminatory" within the narrow context of a given state's tax structure.

Congress may well have cared about "discrimination" as discussed by the Director, but it cared about much more, including "discrimination" against airlines and their customers if faced with state taxes on top of the federal taxes. The "public interest" in connection with the federal aviation program was defined at that time by statute as being served by the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges" and by the "promotion, encouragement, and development of civil aeronautics." 49 U.S.C. §1302(c) & (f) (amended 1977, 1978, 1980) and §1303(b).[12] That public interest, Congress fairly decided, would not be served by permitting this kind of state tax.

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[12] Some of this statutory language was subsequently amended in connection with the deregulation of the aviation industry. In current language, the "public interest" is defined as served by the "availability of a variety of adequate, economic, efficient, and low-price services" and, as before, by the "promotion, encouragement, and development of civil aeronautics." 49 U.S.C. §1302(a)(3) & (11) and §1303(b).

4. THE HAWAII PSC TAX IS NOT PROTECTED AS A GENERAL BUSINESS TAX, FOR IT RUNS COUNTER TO A SPECIFIC FEDERAL POLICY AND PROGRAM

The principal theme sounded by the Director and his amici is that the PSC Tax is essentially similar to a general business tax of wide applicability and, as such, runs counter to no federal policies but is consistent with long-standing congressional policy not to interfere with the general business taxes of states except in narrow and specifically defined situations.[13]

The flaw in the Director's argument is that it does not deal with the specific congressional policy embodied in ADAP and 49 U.S.C. §1513 in particular. In this case, the taxing power of the state must give way to federal pre-emption because of the national interest involved. Congress, in enacting 49 U.S.C. §1513, has made its own legislative finding that taxes, such as the PSC Tax, however reasonable and benign in purpose or name, are unreasonable and must be forbidden if they impose a tax burden on gross receipts from air transportation. This legislative finding is rationally based, and no court, state or federal, can or should set it aside.

In enacting ADAP, Congress created a finely balanced, federal fiscal package consisting of federal taxes on users of aviation facilities and federal expenditures to develop and im-

[13] As discussed earlier, the characterization of the Hawaii PSC Tax as a "general business tax" in the form of a personal property tax is dubious at best given that Hawaii does not have a personal property tax of general application.

prove such facilities.[14] As the 1973 Report of the Senate Committee on Commerce stated:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted to *prohibit local taxation* on passengers or *on the carriage of passengers*. We believe such taxation to be *inimical to the development of a national system* [of airport development] funded in large part *by uniform Federal taxes*. (emphasis added)

S. Rep. No. 12, 93d Cong., 1st Sess. 26 (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News 1434, 1455, and in the Director's Legislative History Appendix, at 121. Clearly, the enactment of 49 U.S.C. §1513 was intended to safeguard the integrity and uniformity of a single federal fiscal structure for airport development. Consequently, one will search the statute's history in vain to find a congressional purpose to permit continued state taxation of gross receipts from air carriage

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[14]The states may be precluded from imposing certain taxes under § 1513, but in return they receive the benefit of the revenues devoted to airport development. Hawaii has received a rich endowment under ADAP, receiving the following sums in the years 1971 through 1979 for airport development:

Year	Federal Contribution to Hawaii under ADAP
1971	$ 285,000
1972	1,192,000
1973	4,637,000
1974	8,212,000
1975	8,029,000
1976	3,612,460
1977	12,781,000
1978	15,048,000
1979	7,794,000
1971-1979 Total	$61,590,460

(J.A., at 19)

merely because the burden of such tax, considered in the isolated context of a single state's tax structure, is no greater on air commerce than on other forms of commerce. To the contrary, *all* state gross receipts taxes on air carriage were proscribed by 49 U.S.C. §1513, reflecting a congressional determination to prevent any tax burden in addition to the federal tax.

5. RECENT DECISIONS FROM OTHER STATES SUPPORT THE POSITION OF APPELLANTS

The brief on the merits filed by Aloha Airlines described, at 14-15, the decision of the New York Supreme Court, Appellate Division, in *Air Transport Ass'n v. New York Dept. of Taxation and Finance*, 91 A.D.2d 169, 458 N.Y.S.2d 709 (N.Y. App. Div. 1983), which held the application of a New York "franchise" tax to airlines to be prohibited by 49 U.S.C. §1513(a). (That opinion was reprinted in full as Appendix B to Hawaiian Airlines' brief on the merits and within the appendix to the amicus brief filed by the Air Transport Association of America.) That court was aware of the Hawaii Supreme Court opinion in the present case but explicitly rejected its reasoning, citing it as "but see" authority.

On June 28, 1983 the Court of Appeals of New York unanimously affirmed that decision. It did so without additional comment, relying upon the reasons stated in the Appellate Division opinion.[15]

Aloha Airlines' brief on the merits, at 15, n. 9, also noted the pendency of litigation on this subject in Alaska.[16] In an

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[15] Aloha Airlines has been advised that the State of New York has sought review of the Court of Appeals' decision in this Court by means of a petition of writ of certiorari, dated July 25, 1983.

[16] The State of Alaska has joined in one of the amicus briefs filed in support of the Director in this appeal.

Order and Judgment filed on May 6, 1983, the Superior Court for Alaska, Third Judicial District, held that:

> By virtue of the clear and unequivocal prohibition contained in 49 U.S.C. 1513(a) and (b) and the Supremacy Clause of the United States Constitution, the Alaska Business License Tax Act may not constitutionally be applied to tax Wien's carriage of passengers or mail or Wien's interstate, foreign or overseas carriage of freight.

Wien Air Alaska, Inc. v. State of Alaska, Dept. of Revenue, No. 3AN 81-8582 Civil (Alaska Superior Ct., 3d Dist., May 6, 1983). (The Order and Judgment is reprinted as the Appendix to this brief.)

These decisions have joined those of the Arizona Court of Appeals, in *State v. Cochise Airlines, Inc.*, 128 Ariz. 432, 626 P.2d 596 (Ariz. Ct. App. 1980), and the Attorney General of Ohio, in Ohio Op. Att'y Gen. No. 73-117 (Nov. 20, 1973), in applying 49 U.S.C. §1513(a) to prohibit state attempts to tax the gross receipts of airlines. Only the Hawaii Supreme Court holds otherwise. The Hawaii decision is the aberration, and it should be reversed.

CONCLUSION

The interpretation of 49 U.S.C. §1513 offered by the Supreme Court of Hawaii and defended by the Director and his amici in this appeal is contrary to the plain language of that statute and would serve to vitiate it. The decision is contrary to the intent and legislative history of the federal statute at issue and puts in jeopardy the important federal program to promote civil aviation. As stated by the Solicitor General in his Brief For The United States As Amicus Curiae In Support Of Appellants, at 2, the "Hawaii tax is a flagrant violation of federal law, and if it is sustained the prohibition contained in Section 1513(a) will be rendered ineffective." The decision of the Supreme Court of Hawaii must be reversed.

Respectfully submitted,

RICHARD L. GRIFFITH
RICHARD R. CLIFTON

CADES SCHUTTE FLEMING
& WRIGHT

Attorneys for Appellant
Aloha Airlines, Inc.

September 1983

APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

WIEN AIR ALASKA, INC.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF REVENUE,

Appellee.

CASE NO. 3AN 81-8582 Civil

ORDER AND JUDGMENT

This is an appeal from a decision and order of the Alaska Department of Revenue entitled Decision No. 81-34, dated November 10, 1981. The matter came on for hearing before the undersigned on March 11, 1983. Appellant, Wien Air Alaska, Inc. was represented by James N. Reeves and John T. Piper.

The appellee, State of Alaska, was represented by Diane T. Colvin, Assistant Attorney General. In accord with the Court's ruling at the hearing,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. By virtue of the clear and unequivocal prohibition contained in 49 U.S.C. 1513(a) and (b) and the Supremacy Clause of the United States Constitution, the Alaska Business License Tax Act may not constitutionally be applied to tax Wien's carriage of passengers or mail or Wien's interstate, foreign or overseas carriage of freight. For the purpose of this judgment, interstate carriage of freight includes Wien's carriage between two points entirely within Alaska if the carriage is part of a continuous interstate journey (for example, carriage of freight via another carrier to Anchorage and carriage by Wien from Anchorage to Fairbanks); and, for years prior to 1978, interstate carriage also includes flights between points in Alaska if the flights travel over international waters.

2. The Alaska Business License Tax Act is not a "franchise tax" within the meaning of 49 U.S.C. §1513(b).

3. Wien's estoppel argument is rejected due to the lack of any evidence of reasonable detrimental reliance on administrative practice.

4. Wien's contention that the proceeds from the sale of its "bush community" business segment are not gross receipts from a "business" within the meaning of AS 43.70.110 is rejected for the reason that transactions in aircraft are, as a matter of judicial notice, a regular part of an airline's business.

5. For the reasons stated herein, Decision No. 81-34 of the Alaska Department of Revenue is hereby reversed in part and affirmed in part.

6. The Court holds that this is a final order and judgment disposing of this appeal *in toto*. In the alternative, the Court hereby determines that there is no just reason for delay and that judgment as to the issues or claims addressed herein may be

entered forthwith pursuant to Rule 54(b) of the Alaska Rules of Civil Procedure.

DATED this 3rd day of May, 1983.

/s/ Milton M. Souter

Honorable Milton M. Souter
Judge of the Alaska Superior
Court for the Third Judicial
District